Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 425

SCHIEFFELIN & CO. and BEITZELL & CO., INC.,

Petitioners,

v.

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Customs and Patent Appeals entered in Customs Appeal No. 5339.

OPINIONS BELOW

The opinion of the United States Customs Court is reported at 61 Cust. Ct. 397. The opinion of the Court of Customs and Patent Appeals is C.A.D. 978; it is reported in 4 Customs Bulletin, No. 19, page 33 and 424 F. 2d 1396; this opinion is appended hereto, pages A-1 to A-18.

JURISDICTION

The judgment of the United States Court of Customs and Patent Appeals was entered on April 23, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1256.

QUESTIONS PRESENTED

Is it contrary to the "national treatment" clause of the treaty with Ireland for the United States to assess internal revenue tax on bottled Irish whisky on a basis which exacts more tax than is assessed on a comparable quantity of the like domestic product and which basis (a) does not in practice apply to bulk domestic whisky which is produced for the domestic market, and (b) cannot, as a matter of law, apply to bottled domestic whisky which is produced for the domestic market? If that question is answered in the affirmative, is the imported whisky subject to import duty on the same quantity as is subject to internal revenue tax, i.e., on the basis of proof gallons?

Treaty of Friendship, Commerce and Navigation between the United States of America and Ireland (1 U.S.T. 788, 797, 801; entered into force September 14, 1950):

ARTICLE XVI

1. Products of either Party shall be accorded, within the territories of the other Party, national and most-favored-nation treatment in all matters affecting internal taxation and sale, distribution, storage and use.

ARTICLE XXI

1. The term "national treatment" means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded thereon, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party.

Treaty with Great Britain to regulate commerce (8 Stat. 228; entered into force July 3, 1815):

Art. 2. No higher or other duties shall be imposed on the importation into the United States of any articles the growth, produce, or manufacture, of his Britannick majesty's territories in Europe, and no higher or other duties shall be imposed on the importation into the territories of his Britannick majesty in Europe of any articles the growth, produce, or manufacture, of the United States, than are or shall be payable on the like articles being the growth, produce, or manufacture, of any other foreign country; * * *

Internal Revenue Code of 1954 (U.S. Code, Title 26):

Sec. 5001. (a) Rate of tax

(1) General.

There is hereby imposed on all distilled spirits in bond or produced in or imported into the United States an internal revenue tax at the rate of $10.50 on each proof gallon or wine gallon when below proof * * *

Section. 5006. Determination of tax.

(a) Requirements.

(1) In general.

Except as otherwise provided in this section, the internal revenue tax on distilled spirits shall be determined when the spirits are withdrawn from bond. * * *

Sec. 5233. Bottling of distilled spirits in bond.

(a) General.

Distilled spirits stored on bonded premises which have been duly entered for bottling in bond before determination of tax or for bottling in bond for export, shall be dumped, gauged, bottled, packed, and cased in the manner which the Secretary or his delegate shall by regulations prescribe. * * *

(b) Bottling requirements

(1) The proprietor of a distilled spirits plant who has made entry for withdrawal of distilled spirits for bottling in bond may, under such regulations as the Secretary or his delegate shall prescribe, * * *

(B) reduce the proof of such spirits by the addition of pure water only to 100 proof for spirits for domestic use, or to not less than 80 proof for spirits for export purposes * * *

(4) Nothing in this section shall authorize the labeling of spirits in bottles contrary to regulations issued pursuant to the Federal Alcohol Administration Act (49 Stat. 977; 27 U.S.C., chapter 8), or any amendment thereof.

Sec. 7852. Other applicable rules.

* * *

(d) Treaty obligations.

No provision of this title shall apply in any case where its application would be contrary to any treaty obligation of the United States in effect on the date of enactment of this title. (Aug. 16, 1954, ch. 736, 68A Stat. 916)

Federal Alcohol Administration Act (U.S. Code, Title 27)

Sec. 206. Bulk sales and bottling.

(a) Offenses

It shall be unlawful for any person –

(1) To sell or offer to sell, contract to sell, or otherwise dispose of distilled spirits in bulk except, under regulations of the Secretary of the Treasury, for export or to the following, or to import distilled spirits in bulk except, under such regulations, for sale to or for use by the following: A distiller, rectifier of distilled spirits, person operating a bonded warehouse qualified under the internal-revenue laws or a class 8 bonded warehouse qualified under the customs laws, a wine-maker for the fortification of wines, a proprietor of an industrial alcohol plant, or an agency of the United States or any State or political subdivision thereof.

(2) To sell or offer to sell, contract to sell, or otherwise dispose of warehouse receipts for distilled spirits in bulk unless such warehouse receipts require that the warehouseman shall package such distilled spirits, before delivery, in bottles labeled and marked in accordance with law, or deliver such distilled spirits in bulk only to persons to whom it is lawful to sell or otherwise dispose of distilled spirits in bulk.

(3) To bottle distilled spirits unless the bottler is a person to whom it is lawful to sell or otherwise dispose of distilled spirits in bulk.

* * *

(c) "In bulk."

The terms "in bulk" mean in containers having a capacity in excess of one wine gallon.

Tariff Schedules of the United States, Schedule 1, Part 12, Headnote 3 (19 U.S.C. 1202).

3. The duties prescribed on products covered by this part are in addition to the internal revenue taxes imposed under existing law or any subsequent Act. The duties imposed on products covered by this part which are subject also to internal revenue taxes are imposed only on the quantities subject to such taxes.

STATEMENT OF THE CASE

The internal revenue tax on whisky and other distilled spirits is based primarily on alcoholic content. The tax rate is $10.50 per proof gallon, a proof gallon being a wine gallon (231 cubic inches) containing 50 percent of alcohol.[1] The higher the alcoholic content, the higher the tax. The tax on 100 gallons of 120 proof whisky (60 percent alcohol) is $1,260.00. The tax on 100 gallons of 190 proof spirits (95 percent alcohol) is $1,995.00.

Only relatively small quanitites of spirits are sold at retail at 100 proof or above. Most have their proof reduced (by addition of water) before bottling. Only bottled spirits can be sold at retail. Distilled spirits bottled in the United States average about 85 proof.

When the proof of the spirits is reduced by the addition of water, the distiller gets more gallons for bottling. One hundred gallons of 120 proof whisky yield 139.5 gallons of bottled 86 proof whisky. One hundred gallons of 190 proof spirits yield 220.9 gallons of bottled 86 proof spirits. In either case the internal revenue tax is equal to $9.03 per bottled gallon of 86 proof whisky or other spirits.

On the other hand, if the proof of the spirits at time of tax determination is less than 100 proof, the tax is assessed as though the spirits were 100 proof. This results from the provision of IRC 5001 which imposes the tax at $10.50 per proof gallon, or *wine gallon when below proof*.

When distilled spirits are produced in, or imported into, the United States, they are put into bond, that is, under government custody, to assure payment of the tax. Sec. 5006 of the Internal Revenue Code provides that the tax is to be determined upon withdrawal from bond; that is to say, the tax is based on the quantity and condition of the spirits upon withdrawal from bond.

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[1] Spirits containing 50 percent of alcohol are called 100 proof; spirits containing less are called below proof or underproof.

In actual practice spirits produced in the United States are withdrawn from bond at proof or above and they are accordingly assessed on the proof gallon basis. The imports in issue, as are practically all bottled imports, are below proof and thus are assessed on wine gallons, that is, as though they were 100 proof.

Petitioners are importers of Scotch whisky and Irish whisky, both bottled at 86 proof. The imports were assessed at $10.50 per bottled gallon, the same tax that would have been payable had they been 100 proof; this is $1.47 per bottled gallon more than is paid on 86 proof domestic spirits. Import duty was also assessed under Schedule 1, Part 12, Tariff Schedules of the United States at the rate of $1.02 per bottled gallon.

Petitioners paid the liquidated taxes and duties and protested the assessments under section 514 of the Tariff Act of 1930. The papers were transmitted to the United States Customs Court which has jurisdiction under 28 U.S.C. 1583. The original protests were limited to the legality of the internal-revenue-tax assessment; by timely amendment, the legality of the tariff-duty assessment was also brought into issue. When petitioners moved for the amendment, the Government opposed the motion. However, the court granted the motion to amend and the Government did not appeal.

The Government defended assessment of more tax on the imports by noting that IRC 5001 imposes tax at the rate of $10.50 on each proof gallon or wine gallon when below proof. The imports in question are below proof. Petitioners contended such assessment on Irish whisky is contrary to Article XVI of the treaty with Ireland because the tax treatment of the Irish whisky is less favorable than the tax treatment of the like domestic product.

Petitioners also contended that the Scotch whisky is entitled to the same treatment as the Irish whisky by virtue of the most-favored-nation treaty with Great Britain. The Government has agreed that if Irish whisky is entitled to

assessment on proof gallons. Scotch whisky is entitled to the same treatment.

It is agreed that the imported whiskies are like bottled distilled spirits of equivalent proof manufactured in the United States. (R. 11; Stip. par. 2)[2] It is also agreed that producers in the United States who market below proof bottled whisky withdraw their distilled spirits from bond at or above proof and tax is determined on a proof gallon basis. (R. 12; Stip. par. 5) The demand in the United States is predominantly for under proof spirits. (R. 12; Stip. par. 7)

In addition, Petitioners have demonstrated that the wine gallon tax (which resulted in taxation of the 86 proof imports as though they were 100 proof) cannot as a matter of law apply to domestic bottled spirits produced for marketing in the United States.

The Government of Ireland and Her Majesty's Government in the United Kingdom of Great Britain and Northern Ireland have filed statements below in support of the position of Petitioners.

The Court of Customs and Patent Appeals felt constrained by the doctrine of *stare decisis* to follow its decision in *Bercut-Vandervoort & Co., Inc. v. United States*, 46 CCPA 28, cert. den. 359 U.S. 953. That court held the tax did not discriminate against imports.

REASONS FOR GRANTING THE WRIT

This court has declared principles for judicial interpretation and upholding of treaties. Treaties made by proper authority being law, courts of justice have no right to annul or disregard any of their provisions. It is their duty to interpret and administer them according to their terms

[2] References to the record are to the printed record in the Court of Customs and Patent Appeals.

Clark v. Bradeii, 16 Howard 635, 657) and in a broad and liberal spirit calculated to make for perpetual amity. (*Tucker v. Alexandroff*, 183 U.S. 424, 437) "When a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other more favorable to them, the latter is to be preferred." (*Bacardi Corp. v. Domenech*, 311 U.S. 150)

The lower courts have failed to take notice of these principles and in the process have nullified *pro tanto* the national treatment clause of the treaty with Ireland.

Furthermore, the Court of Customs and Patent Appeals has apparently repudiated the one significant finding that lent credence to the precedent on which it relies. In *Bercut*, that court found there was a "consistent and uniform application of the statute to domestic distilled spirits and imported distilled spirits." (46 CCPA 36) In the pending case, the same court rejects as immaterial our showing that the wine-gallon tax cannot apply to domestic bottled spirits, saying that "*Bercut* was in no way premised on a view that domestic under proof spirits would or could ever be subject to the internal revenue tax in that condition." (Post p. A-12) We suggest that the rationale of *Bercut* has been perverted because it is impossible that a statute which applies a tax to imports but which does not apply it to the domestic article could in fact be applied "consistently and uniformly" to both domestic and imported products. And if the provision that exacts higher tax on the import could not apply to the like domestic product, how could it be denied that the import is accorded less favorable treatment than the domestic product?

I. RESOLUTION BY THIS COURT OF THE PENDING QUESTION ON NATIONAL TREATMENT IS OF GREAT IMPORTANCE TO THE FOREIGN POLICY OF THE UNITED STATES

This case presents an important question of federal law, a question that has not been, but should be, decided by this court.

The treaty clause guaranteeing that imported goods will be granted national treatment with respect to internal taxation has been a key feature of United States foreign economic policy for many years, at least as far back as the treaty with Germany that took effect in 1925. (48 Stat. 2132, 2139, Art. VIII) It was originally developed as a device to keep tariff protection or its equivalent out of the internal revenue laws and to confine protection to the tariff laws.

Later, with development of the tariff-reduction program under the Trade Agreements Act of 1934, the national treatment clause was found to be a necessary adjunct of trade agreements—necessary to safeguard tariff concessions against impairment or nullification by way of internal revenue taxes which discriminate against imports. ("Operation of the Trade Agreements Program, June 1934 to April 1948," a report by the U.S. Tariff Commission, Part I, page 10, Part II, page 45; see also Senate Finance Committee Hearings on H.R. 1612, 82nd Cong., Part 2, page 1195, and Department of State Publication 2983, page 196, comments on Art. III of General Agreement on Tariffs and Trade.)

Whisky is the most valuable single product exported from the United Kingdom to the United States. The argument has been going on for a generation as to whether the United States method of computing the tax on imported whisky is consistent with or contrary to the national treatment clause in various treaties. As we shall demonstrate, the wine gallon tax does not apply to domestic production

for the U.S. market, but it does apply to imports. The tax discriminates against imports and affords protection to domestic industry.

Resolution of the question by this court will clear away the fog and enable the United States and its trading partners to determine whether the national treatment clause as developed to date is worthwhile.

II. ASSESSMENT OF THE WINE GALLON TAX IS CONTRARY TO THE TREATY WITH IRELAND

The treaty with Ireland guarantees that Irish products will be accorded national treatment in the United States in all matters affecting internal taxation. This means that Irish products will be taxed on terms no less favorable than goods produced in the United States. Although we have demonstrated that the wine gallon tax does not in fact apply to bulk domestic whisky and cannot in law apply to bottled domestic whisky, the court below rejected our demand for equal treatment because it had previously found that the wine-gallon tax under prior law did not conflict with the provision for non-discriminatory treatment in the General Agreement on Tariffs and Trade in a case which failed to disclose the non-application of the wine gallon tax to bottled domestic spirits.

A. The prior litigation

The *Bercut* case involved sec. 2800 of the Internal Revenue Code of 1939 and Art. III of the General Agreement on Tariffs and Trade which are parallel to sec. 5001 of the Internal Revenue Code of 1954 and Art. XVI of the Irish Treaty involved in the pending case. The Court of Customs and Patent Appeals upheld assessment of the wine gallon tax on imported under proof bottled spirits against the claim that imports were taxed more than domestic articles in contravention of the national treatment clause of the GATT. The Court held that sec. 2800 established two

classes of spirits for purpose of taxation: (a) proof or above proof spirits and (b) below proof spirits, that the imports could have been taxed on proof gallons, like domestic spirits, if they had been entered above proof, and that the application of the statute was consistent and uniform for both imported and domestic spirits. (46 CCPA 28, 32, 36) This court denied certiorari. (359 U.S. 953) In *China Liquor Distributing Co. v. United States* (52 CCPA 1) the court below followed its decision in *Bercut* and this court denied certiorari. (380 U.S. 962)

Petitioners have undertaken to distinguish the *Bercut* precedent as a matter of law, chiefly by establishing that the wine gallon tax cannot legally apply to below proof bottled spirits produced in the United States for the domestic market. Also, petitioners point out that even though imported spirits are assessed on proof gallons if imported above proof this means only that the wine gallon tax is not discriminatory on bulk imports and this does not excuse the discrimination against bottled below proof imports.

The court below observed that amicus[3] "accepts the premise of the Customs Court that *Bercut* is not distinguished [from the present case] upon the relevant facts or the law," (p. A-10, post). Petitioners suggest that the Court below thoroughly misunderstood the position of amicus. On page 3 of its brief is the statement: "Her Majesty's Government adopts as its own the position taken in Appellants' brief before this Court." And on page 6 of amicus' brief: "For the sake of its main argument in this brief, Her Majesty's Government accepts the premise that *Bercut* 'is not distinguished upon the relevant facts or the law.'" We suggest that accepting a premise for the sake of argument is a far cry from its unqualified acceptance. Furthermore, amicus' adoption of Appellants' arguments that *Bercut* is

[3]Her Majesty's Government in the United Kingdom of Great Britain and Northern Ireland.

distinguished on the law fully contradicts the lower court's assumption.

B. The wine gallon tax applies to bottled imports but not to the like domestic articles.

Although IRC 5001, considered alone, appears to apply equally to domestic and to imported spirits when considered in the context of the entire statute this is not the case. The wine gallon tax cannot legally apply to domestic spirits bottled for the United States market. The wine gallon tax applies only to imports, and they thereby pay more tax.

IRC 5006 provides for determination of tax on withdrawal from bond. The 1939 Code considered in *Bercut* contained no such provision.

IRC 5233 precludes withdrawal from bond for consumption of domestic spirits bottled below proof. Therefore, such spirits cannot be tax determined below proof and cannot be taxable on wine gallons, the wine gallon tax being legally applicable only to spirits that are below proof at time of tax determination.

The Court of Customs and Patent Appeals, although appearing to have found this to be the case, nevertheless held that *Bercut* was in no way premised on a view that domestic under proof spirits would or could ever be subject to tax in that condition. (Page A-12 post) Although we had thought differently, based on the court's statement in *Bercut* that the statute applied uniformly and consistently to domestic spirits and imported spirits (46 CCPA 36), we will defer to the Court of Customs and Patent Appeals as interpreter of its own opinions. But if the court in *Bercut* did not consider relevant that the tax could not apply equally to domestic and imported spirits, how could it justify its finding that the tax was not discriminatory against the import? We suggest that by taking away the reason for *Bercut*, the court has stripped that case of its standing as a precedent.

As mentioned above, the fact that imported spirits are taxable on proof gallons if imported above proof means only that the wine gallon tax does not discriminate against bulk imports. But this factor does not excuse or mitigate the discrimination against bottled imports because the Irish treaty guarantees equality of treatment to all imports, finished as well as unfinished goods. Courts cannot dispense with any conditions or requirements of a treaty or take away any part of any stipulation upon the notion of equity or convenience or substantive justice. (*The Amiable Isabella*, 6 Wheaton 1)

The fact that the wine gallon tax applies only to bottled imports and not to domestic bottled spirits means that this tax is equivalent to tariff protection to domestic producers. The domestic producers have confirmed this by their own testimony.

After some years of complaints by importers and by foreign governments about the discriminatory nature of the wine gallon tax, the U.S. Treasury Department proposed its repeal in 1951. (H.R. 1535, 82nd Cong., sec. 24(d))

Importers contended at the hearings of the House of Representatives Committee on Ways and Means that the wine gallon tax should be eliminated because it was discriminatory. Domestic producers denied it was discriminatory because importers could bring in their spirits in bulk and bottle them here and thus avoid the wine-gallon tax.

In a statement before the Committee, a witness speaking for twenty-two domestic producers of distilled spirits testified in opposition to section 24(d):

> PROPOSAL IS IN EFFECT A TARIFF REDUCTION AND NOT A SIMPLIFICATION OF CUSTOMS PROCEDURE
>
> The proposal stripped of all its fancy discrimination masquerade is simply an attempt to effect a further reduction in the import duty for foreign shippers of cased whisky. (Hearings, page 380)

* * *

> The net effect of the proposed measure would be to reduce the present tariff protection * * *. (Hearings, page 384)

The Resident Commissioner of Puerto Rico also testified in opposition to section 24(d):

> I appear to call attention to the effect which sec. 24 of H.R. 1535 will have on Puerto Rico's economy. Whether section 24 may properly be classified as customs simplification or not, I shall not discuss. I wish to say, however, that it certainly means a reduction in the tariff protection now afforded in the market of the United States to Puerto Rican rum products with which Cuban rum products compete. (Hearings, page 391)
>
> * * *
>
> Section 24 actually means nothing more or less than a further reduction in the protection granted to domestic liquors, including Puerto Rican rum, as against foreign competition. (Hearings, page 393)

This is "weighty evidence" of the situation which the proposed legislation was designed to change. (*Shapiro v. Thompson*, 394 U.S. 618, 628) It is clear that elimination of the wine-gallon tax (which was successfully resisted by the domestic producers in 1951) would have been equivalent to a tariff reduction. It is equally clear that retention of the tax means a continuation of a discrimination against imports because, unless there is discrimination against imports, there is no protection of domestic industry.

C. Being contrary to the treaty with Ireland the provision of IRC 5001 "or wine gallon when below proof" may not be applied to Irish whisky by virtue of IRC 7852(d).

In a classic *non sequitur*, the lower court has imputed to Congress an intent not to have the wine gallon tax invalidated by IRC 7852(d). It goes like this:

> Referring specifically to the present case, the classification of spirits for internal revenue purposes in the two categories of proof gallon and wine gallon amounts but to a continuation of a practice long established at the time Congress passed the 1954 Internal Revenue Act specifically continuing it. The Irish treaty was already in force at that time. It is apparent that Congress had knowledge through the hearings on the Customs Simplification Act of 1951, discussed at length by appellants and *amicus*, of the controversy relating to the application of the wine gallon tax to bottled imported underproof spirits. In those circumstances, we cannot conceive that Congress, in including in the 1954 Internal Revenue Code, Sec. 7852(d), denying effect to provisions "contrary to any treaty obligation," intended it to apply to the express provision for the wine gallon rate in Sec. 5001. (Page A-14 post)

The court's difficulty is that it misconstrued the scope of Sec. 7852(d). The opinion's partial quotation from the section omits the phrase that limits the section to a treaty obligation * * * "in effect on the date of enactment of this title."

Congress fully appreciated the possibility that a section of the Act might conflict with an existing treaty and intended to subordinate the former to the latter; it cannot reasonably be assumed that Congress also intended to preclude the application of the Sec. 7852(d) to a section within the perimeter of its coverage.

If it can be said that Congress could not have intended the section to apply to the wine gallon provision, it can also be said that the section was not intended to apply to some other possibly conflicting provision then for what purpose was the section included? The Congress could only have intended its potential applicability to reach all sections within its coverage.

If, on the other hand, the emphasis is put on Congress' knowledge of the effect of the wine gallon tax because of prior testimony, this is no reason for holding sec. 7852(d) inapplicable because we must presume that Congress knows what it is doing in all cases, whether the incident is covered by specific testimony or not. It does not seem appropriate for the court to suggest that Congress suffers from lack of knowledge.

On the other hand, the determination of whether a particular provision of law is in conflict with a treaty is a judicial function and the reenactment of the wine gallon tax in 1954 in the face of the treaty with Ireland is not evidence of a Congressional determination that there is no conflict. This is a matter Congress has left to the judiciary, without any expression or implication of Congressional intent.

Since the provision "or wine gallon when below proof" cannot legallly be applied to these imports, they are taxable under the other provision of IRC 5001, per proof gallon, the same as domestic spirits.

III. THE COURT OF APPEALS DECISION IN THIS CASE IS IN CONFLICT WITH A DECISION OF THE NINTH CIRCUIT COURT OF APPEALS

In a case strikingly parallel to the pending case, the Court of Appeals for the Ninth Circuit reached a conclusion opposite to that of the Court of Customs and Patent Appeals in the pending case. Section 3350 of the Internal Revenue Code of 1939 directed the levy "upon articles coming into the United States from the Virgin Islands, a

tax equal to the Internal Revenue tax imposed in the United States upon like articles of domestic manufacture." This provision for national treatment of Virgin Islands products with respect to U.S. taxation is comparable to the provisions of the Irish treaty which guarantee to Irish products treatment no less favorable that the treatment accorded in the United States, in like situations, to products of the United States.

Parrott & Co. v. United States, 156 F.2d 943 involved bottled below proof distilled spirits brought into the United States tax area from the Virgin Islands; such spirits were assessed internal revenue tax on wine gallons, as was the bottled below proof Irish whisky at bar. The taxpayer litigated and the Ninth Circuit Court held the spirits were taxable on proof gallons, not wine gallons.

The court below has rejected *Parrott* as a relevant precedent, saying that the language of sec. 3350 is "entirely different" from the treaty language. (Page A-13, post) We agree there are some differences in language (tax "equal to" versus tax "no less favorable"), but suggest that the principle of sec. 3350 is the same as the principle of Art. XVI of the Irish treaty and that the question in the pending case is the same as the question in *Parrott*.

CONCLUSION

The questions presented in this case are of such a nature that they can be resolved only by this court. If the national treatment clause is so fragile that it can be avoided by a simple device of timing of tax determination, as held by the lower courts, the sooner we know it the better; we cannot know the answer until this court has ruled. Further, the nations with which the United States has negotiated national treatment clauses may well be concerned that we have one concept for national treatment when products of a United States possession (Virgin Islands) are involved and

a much more restrictive concept when imports from foreign countries are involved.

For the foregoing reasons the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

(424 F.2d 1396)

Schieffelin & Co. and Beitzell & Co., Inc. v. The United States

No. 5339, C.A.D. 978

United States Court of Customs and Patent Appeals, April 23, 1970

Appeal from United States Customs Court, C.D. 3640.
[Affirmed] 57 CCPA

Edwin G. Martin, attorney of record, for appellant.
Ansel F. Luxford, amicus curiae, Morgan, Lewis & Bockius, of counsel.

William D. Ruckelshaus, Assistant Attorney General, *Andrew P. Vance*, Chief, Customs Section, *Glenn E. Harris* for the United States.

[Oral argument January 6, 1970 by Mr. Martin, Mr. Luxford and Mr. Harris]

Before Rich, *Acting Chief Judge*, Almond, Baldwin, Lane, *Associate Judges*; and McManus, *Chief Judge*, Northern District of Iowa, sitting by designation.

Baldwin, *Judge*, delivered the opinion of the court:

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

SCHIEFFELIN & CO. and BEITZELL & CO., INC., *Appellants,* v. THE UNITED STATES, *Appellee.*	)	October Term 1969. Customs Appeal No. 5339

April 23, 1970

BALDWIN, Judge.

This appeal is from the judgment of the United States Customs Court, Third Division,[1] overruling two consolidated protests relating to certain 86 proof bottled spirits, imported from Ireland and Scotland, respectively, between March 1964 and April 1965. As filed, the protests were directed only to the internal revenue tax, which was levied at the rate of $10.50 per wine gallon[2] under section 5001(a)(1) of the Internal Revenue Code of 1954, and the importers claimed that the tax should have been levied on a proof gallon basis at 86% of $10.50, amounting to $9.03 per wine gallon. Subsequent to submission of the cases, the Customs Court, on motion of appellants and over objections by the

[1] *Schieffelin & Co., et al. v. United States*, 61 Cust. Ct. 397, C.D. 3640 (1968).

[2] A "wine gallon" is a standard United States gallon containing 231 cubic inches. The term is generally applied to spirits that are less than 100-proof, i.e., less than 50 percent alcohol by volume. A gallon of 100 proof spirits is called a "proof gallon" and a gallon containing over 50 percent alcohol is designated "over proof" or "above proof."

government, allowed amendment of the protests by adding a paragraph which reads:

> Your assessment of tariff duties under item 168.45, Tariff Schedules of the United States, on the basis of wine gallons is illegal, null and void because it is contrary to headnote 3, Part 12, Schedule 1, T. S. U. S. Under that provision, duties on such products may be assessed only on the quantities legally subject to internal revenue taxes, namely on the basis of proof gallons.

The protests were submitted to the Customs Court upon a stipulation including the following:

> 1. That the merchandise in issue consists of bottled, below proof distilled spirits which are the manufacture of Scotland or Ireland, as hereinafter related, on which tax was assessed at $10.50 per wine gallon under section 5001, Internal Revenue Code.
>
> 2. That the merchandise in issue is like bottled distilled spirits of equivalent proof manufactured in the United States and that the merchandise in protests No. 66/24918 is like the merchandise in protest No. 66/70446.
>
> 3. That a proof gallon of distilled spirits contains 50 percent of alcohol by volume, and a proof gallon is called 100 proof, that is, the number of proof represents twice the percentage of alcohol.
>
> 4. That below-proof distilled spirits contain less than 50 percent of alcohol by volume and the number of proof represents twice the percentage of alcohol. For example spirits containing 43 percent of alcohol are called 86 proof.
>
> 5. That in the United States, the practice of producers of domestic below-proof bottled distilled spirits is to withdraw spirits from bond at or above proof and have the taxes under sec. 5001, Internal Revenue Code, determined on the proof-gallon basis. Thereafter water is added to reduce the proof to the desired level before bottling. In recent years, all

distilled spirits legally bottled in the United States have averaged about 85 proof. (Statistical Releases, Alcohol and Tobacco Tax Division, U.S. Treasury Department).

6. That the assessment on below-proof bottled distilled spirits on the basis of wine gallons requires payment of higher taxes than would be payable on the basis of proof gallons.

7. That over 90 percent of domestic distilled spirits legally produced for consumption in the United States are withdrawn from bond in bulk at or above proof and are taxed on proof gallons. Over 90 percent of the distilled spirits legally sold at retail in the United States are bottled below proof.

8. That distilled spirits cannot be legally sold in the United States at retail in bulk; only bottled distilled spirits may legally be sold at retail.

9. That Scotland is one of His Brittannick Majesty's territories in Europe within the meaning of the Treaty of 1815 referred to in the protest.

10. That the merchandise in Protest No. 66/70446 consists of bottled distilled spirits the manufacture of Ireland, is 86 proof, and amounts to 116,800 wine gallons on which tax was assessed.

11. That the merchandise in Protest No. 66/24918 consists of bottled distilled spirits the manufacture of Scotland, is 86 proof and amounts to the following quantities:

A.	Entry No. 81328:	713.400 wine gallons
B.	Entry No. 56321:	2398.800 wine gallons
C.	Entry No. 81342:	354.600 wine gallons
D.	Entry No. 87136:	475.400 wine gallons

* * *

Section 5001(a)(1) of the Internal Revenue Code of 1954, 68A Stat. 595, as amended, 26 USC 5001(a)(1), reads in pertinent part:

(a) Rate of tax

(1) General. There is hereby imposed on all distilled spirits in bond or produced in or imported into the United States an internal revenue tax at the rate of $10.50 on each proof gallon or wine gallon when below proof * * *

Section 7852(d) of the Internal Revenue Code, 68A Stat. 922, 26 USC 7852(d) provides:

(d) Treaty obligations.

No provision of this title shall apply in any case where its application would be contrary to any treaty obligation of the United States in effect on the date of enactment of this title.

Section 5006(a)(1) of the Internal Revenue Code (I.R.C.) of 1954 provides that the tax on spirits be determined when they are "withdrawn from bond." The determination is made on withdrawal from internal revenue bond in the case of domestic spirits and, in the case of imported spirits, on withdrawal from customs bond.

Appellants claim that the imposition of the internal revenue tax on the wine gallon basis under Sec. 5001(a)(1) discriminates against their bottled below proof spirits contrary to treaty obligations of the United States and that, under Sec. 7852(d), the provision for so imposing the tax therefore should not apply.

They regard discrimination against the spirits imported from Ireland, Irish whiskey, to be banned by the Treaty of Friendship, Commerce and Navigation between the United States and Ireland, entered into force on September 14, 1950. The portions of that treaty pertinent here are:

Article XVI (1 UST 788 at page 797):

1. Products of either Party shall be accorded within the territories of the other Party, national and most-favored-nation treatment in all matters affecting internal taxation and sale, distribution, storage and use:

Article XXI (1 UST 788 at page 801):

> 1. The term "national treatment" means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party.

As to the spirits imported from Scotland, i.e., Scotch whiskey, appellants rely additionally on the treaty between the United States and Great Britain, 8 Stat. 228, entered into force July 3, 1815. Under that treaty, products of Great Britain coming into this country are to be accorded most-favored-nation treatment with respect to "duties" levied against them.

Appellants point to the practice of domestic producers of below proof spirits, of withdrawing the spirits from bond in proof or over proof condition whereby they are subjected to tax on the proof gallon basis and then diluting them to below proof for bottling. The tax of $10.50 per proof gallon so paid is reflected in the cost of domestic spirits bottled at 86 proof, for example, to the extent of only 86 percent of $10.50, or $9.03 per wine gallon. If the foreign produced spirits are imported in bulk at proof or over proof and subsequently bottled at 86 proof, the tax is levied on the bulk spirits on the proof gallon basis just as with domestic spirits and the reflection of that tax on the ultimate bottled product amounts to $9.03 on the gallon just as that on the domestic bottled product. However, the instant imports, having been bottled in Ireland and Scotland, respectively, at 86 proof, were necessarily withdrawn from customs bond in below proof condition so that the resulting tax amounted to $10.50 per *bottled* gallon, or $1.47 per gallon more than the reflected tax on domestic or imported spirits withdrawn from bond in proof or over proof condition and then bottled in the United States at 86 proof.

Appellants' protests are grounded on the charge that the aforementioned circumstances result in discrimination

against their imported below proof bottled spirits relative to below proof bottled domestic spirits. They state that the imported Irish whiskey is entitled to national treatment within the United States under Article XVI of the treaty with Ireland, and that, under Article XXI of that treaty, "national treatment" means treatment upon terms no less favorable than the treatment accorded in like situations to products of the United States. With respect to the Scotch whisky, appellants take the position that the most-favored-nation provisions of the British treaty of 1815 "operate prospectively to encompass the benefits conferred upon products of Ireland in the National Treatment provisions of the Irish treaty, and they encompass specifically the tax here in dispute."

The Customs Court accepted the premise, conceded here by appellee, that the imports from Great Britain are entitled under the most-favored-nation clause of the British treaty to whatever tax treatment is required with respect to the imports of Irish origin. It thus found, and we think correctly, that the case comes down to whether assessment of taxes on the imported merchandise on the wine gallon basis under the stipulated circumstances is in violation of Articles XVI and XXI of the Irish treaty. It observed that the time at which the tax is determined fixes the basis of the assessment and found that "the issue turns on whether the stipulated circumstances involve 'like situations' at the time of tax determination."

In disposing of that question, the court concluded that the *bottling* of the spirits has no bearing on the "taxing event" to which both the domestic and imported products are subject, observing that Sections 5001(a)(1) and 5006(a)(1) are addressed to the spirits and not to the containers which house them. It stated:

> We cannot conclude that the rate of taxation should be the same for both domestic and foreign spirits merely because both products end up in the hands of the consumer bottled and underproof. The

> criterion on which the taxing event takes place is, with respect to the domestic spirits, the withdrawal of the spirits from bond. Under the stipulated facts at bar the imported spirits are underproof at the time of tax determination, while the domestic spirits are at or overproof at such time. It is this difference in the nature of the taxed commodity which, in our view, militates against plaintiff's claim of discrimination in violation of treaty obligation.
>
> * * *
>
> * * * Underproof imported spirits (bottled) and proof or overproof domestic spirits (bulk) at the time of tax determination do not involve "like situations," and consequently, the provisions of Articles XVI and XXI of the Irish treaty are not applicable here. * * *

The Customs Court relied on *Bercut-Vandervoort & Co. v. United States*, 46 CCPA 28, C.A.D. 691 (1958), *cert. den.*, 359 U.S. 953 (1959),[3] finding that case "not distinguished upon the relevant facts or the law from the case before the court" and held it *stare decisis* herein. It stated:

> * * * In *Bercut-Vandervoort & Co., Inc., v. United States*, *supra*, the protest considered by the United States Court of Customs and Patent Appeals involved distilled spirits which were imported underproof in bottles and on which the internal revenue taxes were assessed on the wine gallon basis. In substance, the provisions of the General Agreement on Tariff and Trade therein considered permitted, on imported products, "a charge equivalent to an internal tax" on like domestic products and prohibited the imported products of a contracting party from being "subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those

[3]The *Bercut* case was followed and found controlling in the subsequent case of *China Liquor Distributing Co. v. United States*, 52 CCPA 1, C.A.D. 847 (1964), *cert. den.*, 380 U.S. 962 (1965).

applied, directly or indirectly, to like domestic products."

Appellants concede that the provisions of the Internal Revenue Code of 1939 before this court in *Bercut* are comparable to those of Section 5001(a)(1) of the Internal Revenue Code of 1954 now before us. Also, they make no contention that the "national treatment" provision of the Irish treaty is in any way more restrictive than the similar requirements, expressed in different terms, of GATT which were found not to be violated in *Bercut*.

It is also acknowledged by appellants that Sec. 5001 appears on its face to be non-discriminatory in that it establishes two classifications proof (and above-proof) spirits and below proof spirits and applies equally to both without regard to whether they are domestic or imported. Rather, they urge that it is examination of other provisions of the law, not considered in *Bercut*, which shows that Sec. 5001 is in fact discriminatory as applied in *Bercut* and here. Those provisions are (1) Sec. 5006, I.R.C., *supra*, which provides that the tax shall be determined when the spirits are withdrawn from bond; (2) Sec. 5233, I.R.C., which provides that spirits cannot be bottled in bond below 100 proof (except spirits for export which are not subject to tax); and (3) Sec. 206(a) of the Federal Alcohol Administration Act, 27 USC 206(a), which allows only bottled spirits to be sold to the ultimate consumer. Appellants urge that these provisions were not considered in *Bercut* and that Sec. 5006 had no counterpart in the 1939 Act that the court had before it in that case, and regard them as establishing that the law does not permit domestic *bottled* spirits to be below proof at the time of tax determination. Since bottled imported spirits are the only bottled spirits to which the wine gallon tax can legally apply, they reason: the assessment of the wine gallon tax of Sec. 5001 on their bottled underproof imports is discriminatory.

Her Majesty's Government in the United Kingdom of Great Britain and Northern Ireland submitted a brief in

support of the appeal as *amicus curiae* and was represented by counsel at oral hearing. *Amicus* "accepts the premise of the Customs Court that *Bercut* 'is not distinguished [from the present case] upon the relevant facts or the law,'" but it "questions the correctness of the conclusions drawn therefrom."

More specifically, *amicus* points out that the United States undertook the obligation of GATT[4] subject to the Protocol of Provisional Application. That Protocol accepted Part II of the agreement, which part includes Article III embodying the restriction against imported products being subjected to internal taxes or other internal charges in excess of those applied to like domestic products, "to the fullest extent not

[4] The provisions of GATT, as amended (T.D. 51802 and T.D. 52167), considered in *Bercut* were quoted therein as follows:

Article II

2. Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product (a) a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part; * * *

Article III

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

inconsistent with existing legislation." *Amicus* then concludes that, since the wine gallon provision was existing legislation, the same result could have been reached in *Bercut* on the basis that the Protocol rendered the national treatment provision of Part II of GATT (Article III) ineffective instead of on the grounds on which it was decided that the national treatment provision was not violated.

As evidence of error in the grounds on which *Bercut* actually was decided, *amicus* refers to the acknowledgment in paragraph 4 of Article III of GATT that internal taxes should not be applied to imported or domestic products so as to "afford protection to domestic production." It then refers to proceedings and documents concerned with the proposed Customs Simplification Act of 1951 (H.R. 1535). That material[5] indicates that the executive branch of the government proposed the elimination of the wine gallon provisions of the Internal Revenue Code and that certain officials apparently regarded those provisions in derogation of the intent of GATT to avoid internal tax discrimination against imported goods. *Amicus* and appellants also point to testimony of certain representatives of domestic producers of spirits, and appellants also to testimony of the Resident Commissioner of Puerto Rico, opposing the elimination of the wine gallon provision as indicating that such elimination would amount effectively to a reduction in the import duties for foreign shippers of cased whiskey. *Amicus* also asserts that, besides itself, "the Common Market, consisting of France, Germany, Italy, Belgium, Luxembourg and the Netherlands," and Canada have "protested the United States excise tax system for spirits imported in bottles (wine gallon) as being contrary to Article III of GATT."[6]

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[5]The material is derived largely from *1951 House Simplification Hearings* although reference is also made to *1951 Senate Trade Extension Hearings* (Feb. 22 - Apr. 6, 1951).

[6]*Amicus* also refers in a footnote to its brief to "a critical study of *Bercut* in which the conclusions reached support the analysis here made and the position of this brief" in 61 *Columbia Law Review*, 549-551.

We think the Customs Court was plainly correct in regarding the decision in *Bercut* as compelling the conclusion it reached here. Not only is the language in Sec. 5001 equivalent to that in Sec. 2800 of the 1939 Act considered in the earlier case but the covenants in the Irish treaty are no more restrictive than those of GATT which were considered in *Bercut*.

Appellants' reliance here on Sec. 5006 and Sec. 5233 of the I.R.C. of 1954 and Sec. 206(a) of the Federal Alcohol Administration Act as establishing that the law does not permit domestic bottled spirits to be below proof at the time of tax determination does not demonstrate that the present case is distinguished from *Bercut* in any significant respect. As a matter of fact, it was assumed arguendo at the outset in *Bercut* that it was the "universal practice" of domestic producers to withdraw spirits from bond when over proof, and thus pay tax on the proof gallon basis, before diluting them. Thus *Bercut* was in no way premised on a view that domestic under proof spirits would or could ever be subject to the internal revenue tax in that condition.[7]

Neither do we find any significance in the contention of *amicus* that *Bercut* might have been decided with the same result on the basis of the adherence of the United States to GATT having been provisional under the Protocol of Provisional Application. The case was actually decided on the broader rationale that application of the wine gallon provisions of the 1939 Internal Revenue Code did not discriminate against imports of bottled under proof spirits under the national treatment provisions of GATT.

---

[7] The parties are apparently in agreement that it is legally possible that bottled domestic belowproof spirits could be subjected to taxation on the wine gallon basis. Domestic spirits intended for export (tax free) can be bottled in bond as low as 80 proof. *If* spirits so processed were subsequently diverted to the domestic market instead of being exported, they would be subject to tax on the wine gallon basis.

The decision in *Bercut* was reached after thorough consideration of the precedents, including the only case which appellants now advance holding that underproof spirits should be subjected to internal revenue tax on the proof-gallon, rather than wine gallon, basis. That case, *Parrott & Co. v. United States*, 156 F.2d 943 (CA 9, 1946) involved interpretation of a provision of the Internal Revenue Code of 1918 providing that there be levied, collected and paid "upon articles coming into the United States from the Virgin Islands, a tax equal to the internal revenue tax imposed in the United States upon like articles of domestic manufacture." The court found the quoted provision to require that underproof rum, which was alleged to have been distilled in the Virgin Islands at more than 100 proof, be taxed, *not as an importation*, but "as if produced in the United States." We think the court in *Bercut* was correct in distinguishing that case, where the sole issue was interpretation of language of the tax law and that language was entirely different from the prohibatory language of Article III, section 2, of the trade agreement involved in *Bercut*.[8]

The arguments that the unsuccessful attempt of officials of the executive branch of the government in 1951 to persuade Congress to eliminate the wine gallon provisions of the Internal Revenue Code, with certain of the officials urging the change as a means to insure compliance with GATT, and that persons opposing the proposed change referred to it as amounting to a reduction in the protection afforded the domestic (including Puerto Rican) spirits industry, are not considered sufficiently indicative of discrimination to justify overruling *Bercut*. It is of course apparent how foreign producers would find the elimination of the wine gallon provision desirable and it is also understandable that some United States government officials might consider it in the best interests of international trade cooperation to do away with an aspect of the Internal Revenue Code that may well be an irritant to foreign trade negotiators. It is

[8] See note 4.

significant to note that there is no history of the GATT negotiations of record to show that that treaty was regarded as compelling the abrogation of a United States tax provision having a long prior history.[9] What is of record does not clearly establish that *Bercut* was in error, and therefore the principle of *stare decisis* dictates that we should not reverse ourselves. See *R. J. Saunders & Co., Inc. v. United States*, 54 CCPA 29, C.A.D. 898 (1966).

Referring specifically to the present case, the classification of spirits for internal revenue purposes in the two categories of proof gallon and wine gallon amounts but to a continuation of a practice long established at the time Congress passed the 1954 Internal Revenue Act specifically continuing it. The Irish treaty was already in force at that time. It is apparent that Congress had knowledge through the hearings on the Customs Simplification Act of 1951, discussed at length by appellants and *amicus*, of the controversy relating to the application of the wine gallon tax to bottled imported underproof spirits. In those circumstances, we cannot conceive that Congress, in including in the 1954 Internal Revenue Code, Sec. 7852(d), denying effect to provisions "contrary to any treaty obligation," intended it to apply to the express provision for the wine gallon rate in Sec. 5001.

The rationale of the protests against the customs duty imposed on the imports under item 168.45, Tariff Schedules of the United States, depends upon the proposition that the quantities of spirits on which the internal revenue tax is applied should be adjusted[10] because the applications of the

[9] As noted in *Bercut*, the classification of spirits at proof (or above proof) gallon and wine gallon "were established by the Congress in 1868 for purely domestic purposes and have been retained in substance each time the Congress has considered this subject. 15 Stat. 125 (1868); Rev. Stat. §3251 (1875); 40 Stat. 1105 (1919) as amended, 26 U.S.C. §5000(a)(1)."

[10] See the terms of the amendment to the protests, quoted, *supra*. CA-5339.

latter tax on the wine gallon basis was improper. Since we find no basis for such an adjustment, the propriety of the Customs Court's allowing amendment of the protests need not be considered in reaching the conclusion that the protests against the customs duties were properly disallowed.

The judgment of the Customs Court is affirmed.

AFFIRMED

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SUPREME COURT, U.S.
FILED
AUG 6 1970
E. ROBERT SEAVER, CLERK

No. 425

In the Supreme Court of the United States

OCTOBER TERM, 1970

SCHLESSLIN & CO., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

MEMORANDUM FOR THE UNITED STATES

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 425

SCHIEFFELIN & CO., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

MEMORANDUM FOR THE UNITED STATES

At the request of the Department of State, I am transmitting a Note to it from the Embassy of Ireland (with attachments) relating to the above case. The views of the United States on this case will be set forth in a separate response to the petition.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1970.

AMBASÁID NA hÉIREANN
EMBASSY OF IRELAND
Washington, D.C.

The Ambassador of Ireland presents his compliments to the Honorable the Secretary of State and,

400-479—70

with reference to previous correspondence regarding the imposition of excise tax and import duty on distilled spirits from Ireland imported to the United States in bottle and to the case of *Schieffelin et al. v. the United States*, has the honour to refer particularly to the Treaty of Friendship, Commerce and Navigation between the United States and Ireland, done at Dublin in 1950.

The Government of Ireland have already expressed the opinion that the present United States' method of assessing tax and duty on bottled imports of Irish whiskey is contrary to the proper interpretation of the relevant provisions of the Treaty of Friendship, Commerce and Navigation between the United States and Ireland, done at Dublin in 1950. This view and the bases thereof were summarised in the Note and Memorandum of 21 December, 1967 to the then Secretary of State, who kindly arranged through the Department of Justice for them to be brought to the attention of the United States Customs Court in its consideration of the Schieffelin case.

The Ambassador of Ireland now understands that a petition will be filed in the United States Supreme Court for the purpose of seeking review of the decision in the Schieffelin case. The Government of Ireland would be grateful if the Secretary of State would be good enough to bring the arguments in the attached Memoranda to the attention of the United States Supreme Court in order to aid it in considering the issues raised in the case.

The Ambassador of Ireland avails himself of this opportunity to renew to the Honorable the Secretary of States the assurances of his highest consideration.

[SEAL]

22 JULY, 1970.

MEMORANDUM BY THE GOVERNMENT OF IRELAND

The Note and Memorandum of 21 December, 1967 from the Ambassador of Ireland to the Secretary of State, set forth the view of the Government of Ireland on the proper construction of the Treaty of Friendship, Commerce and Navigation, between Ireland and the United States and in particular in relation to the taxation of Irish whiskey on importation into the United States in bottles. A copy of that Note and Memorandum is attached hereto. Moreover, the records of the Government of Ireland relating to the negotiation of said Treaty contain no evidence of an agreed interpretation or separate understanding that the provisions thereof are to be interpreted otherwise than as indicated in the said Note and Memorandum.

The Government of Ireland are, however, aware that the United States Lower Courts have in fact construed the Treaty otherwise and that in consequence of these decisions imports of Irish whiskey in bottles into the United States will be taxed at a higher rate than nationally produced whiskey. In the Government's view, this is a misinterpretation of the Treaty involving loss of important and valuable rights due under it to Ireland and her nationals.

The Government of Ireland understand that the decisions of the Lower Courts will be submitted for review to the United States Supreme Court. It is their earnest wish that their views be brought to the attention of the Supreme Court.

Washington, D.C.,
22 July, 1970.

AMBASÁID NA hÉIREANN
EMBASSY OF IRELAND
Washington, D.C.

The Ambassador of Ireland presents his compliments to the Honorable the Secretary of State and has the honour to refer to the Aide Mémoire presented by him to Under Secretary of State Eugene V. Rostow on November 13, 1967, in relation to the imposition of excise tax and import duty on distilled spirits imported in bottle. In that Aide Mémorie it was stated that the Government of Ireland view the present method of taxation in this matter as discriminatory and contrary to their Treaty rights and consider that there are persuasive legal arguments to support this view.

Attached hereto is a memorandum containing an outline of the legal arguments which the Government of Ireland are advised should apply to the proper interpretation of the relevant provisions of the Treaty of Friendship, Commerce and Navigation between the United States and Ireland done at Dublin in 1950.

The Government of Ireland would be grateful if the Secretary of State would be good enough to bring

the arguments in the attached memorandum and in the Aide Mémoire referred to, to the attention of the United States Customs Court in accordance with established procedure in order to aid it in determining the issues raised in the case of Schieffelin et al. V United States and also to the attention of the parties to that case.

[SEAL]

DECEMBER 21, 1967.

ASSESSMENT OF EXCISE TAX ON IRISH WHISKEY

The United States authorities at present impose excise tax on Irish whiskey imported into the United States under proof in bottles on a wine gallon basis, that is to say by volume, instead of on a proof gallon basis, by alcoholic content. It is the view of the Government of Ireland that under the provisions of the Treaty of Friendship, Commerce and Navigation between Ireland and the United States, concluded in 1950, excise tax should be imposed on a proof gallon basis, as is the case with whiskey produced in the United States.

Article XVI of the Treaty of Friendship, Commerce and Navigation provides in par. 1:—

> "Products of either Party shall be accorded, within the territories of the other Party, national * * * treatment in all matters affecting internal taxation * * *"

Article XXI defines the term "national treatment" in par. 1 as meaning—

> "* * * treatment accorded within the territories of a Party upon terms no less favourable

than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party".

Article XX contains general exceptions to the provisions of the Treaty, none of which appear to apply to the question under consideration. In particular, par. 2 permits—

> "* * * action by either Party which is required or specifically permitted by the General Agreement on Tariffs and Trade * * * during such time as such Party is a contracting Party to the General Agreement * * *"

The General Agreement does not, however, require or specifically permit any action in conflict with the obligations under Article XVI and XXI of the Treaty. On the contrary Article III of the General Agreement prohibits action of that nature.

The Government of Ireland is, of course, aware that in the Protocol of Provisional Application whereby the Government of the United States acceded to the General Agreement, they undertake to apply Part II of the Agreement "to the fullest extent not inconsistent with existing legislation". While this stipulation provides for modified application of the terms of the General Agreement between the Parties to the Protocol (pending the entry into force of the Agreement), it does not amend the provisions of the General Agreement, which alone is referred to in Article XX (2) of the Treaty of Friendship, Commerce and Navigation. The Government of Ireland are therefore

satisfied that the obligations assumed under Articles XVI (1) and XXI (1) of the Treaty are unaffected by the provisions of Article XX.

As excise duty is imposed on whiskey produced domestically in the United States on a proof gallon basis, it is the view of the Government of Ireland that under the provisions of the Treaty of Friendship, Commerce and Navigation as quoted above excise duty should be imposed on imported bottled Irish whiskey on a proof gallon basis also.

Washington, D.C.,
December 21, 1967.

U.S. GOVERNMENT PRINTING OFFICE 1970

SUPREME COURT, U. S.

AUG 24 1970

E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 425

SCHIEFFELIN & CO. & BEITZELL & CO., INC., *Petitioners,*

v.

THE UNITED STATES, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF AMICUS CURIAE ON BEHALF OF HER MAJESTY'S GOVERNMENT IN THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 425

SCHIEFFELIN & CO. & BEITZELL & CO., INC., *Petitioners*,

v.

THE UNITED STATES, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF AMICUS CURIAE ON BEHALF OF HER MAJESTY'S GOVERNMENT IN THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Her Majesty's Government in the United Kingdom of Great Britain and Northern Ireland respectfully submits this brief as amicus curiae in support of the petition of Schieffelin & Co. *et al.*, (hereinafter the Petition) that a writ of certiorari issue to review the

judgment of the United States Court of Customs and Patent Appeals entered in Customs Appeal No. 5339, 57 C.C.P.A. (Cust.) , 424 F.2d 1396 (1970).[1]

I

THE NATURE OF THE INTEREST OF HER MAJESTY'S GOVERNMENT

This case concerns the substantive content of treaty commitments between the United States and the United Kingdom and has a direct bearing on the General Agreement on Tariffs and Trade[2] to which both nations are parties signatory. Specifically, it is the position of Her Majesty's Government that under Article 2 of the Convention to Regulate Commerce between the United States and the United Kingdom, July 3, 1815, 8 Stat., 228, T.S. No. 110 (hereinafter the British Treaty), the products of the United Kingdom coming into the United States are to be accorded most-favored-nation treatment on taxes levied against them,[3] which provision entitles the United Kingdom to the benefits of the Treaty of Friendship, Commerce and Navigation between the United States and the

[1] This brief is filed with the written consent of all of the parties, pursuant to Rule 42 of the Rules of this Court.

[2] Original form, 61 Stat. (5) A3-A90. Current Form: Basic Instruments and Selected Documents Vol. IV. Republished: Department of State Publication No. 8468 (hereinafter referred to as GATT and cited as BISD Vol. IV).

[3] *See* Petition at 3. Although the language of the most-favored-nation clause in the 1815 British Treaty is couched in the archaic form of "duties", Article 2 has been construed to encompass excise taxes imposed on imported products. *See United States* v. *Domestic Fuel Corp.*, 21 C.C.P.A. (Cust.) 600 (1934). That construction is not at issue in this case.

Republic of Ireland, January 21, 1950, 4 U.S.T. 788, T.I.A.S. No. 2322 (hereinafter the Irish Treaty).[4] The rights of the Republic of Ireland and the United Kingdom under such treaties are at issue in this case.

II

STATEMENT OF THE CASE

This is a case of treaty interpretation. It involves the amount of taxes payable on imported whisky and it arises in the customs courts. But the minutiae of tax and customs law are not controlling features in this case. At issue is the application of Article XVI of the Irish Treaty which, in common with many other United States' commercial treaties, secures to those imports "national * * * treatment in all matters affecting internal taxation * * *". More precisely, Her Majesty's Government contends that the federal tax on a gallon of whisky imported in bottles at the usual proof (86 proof) is $10.50, while the tax borne by the same amount of domestic whisky at the same proof is only $9.03. This differential occurs despite the provisions of the Irish Treaty guaranteeing imports protection from discriminatory taxes.

The Internal Revenue Code of 1954 (IRC), Sec. 5001(a)(1), provides for a federal excise tax on whisky and other distilled spirits—whether produced in the United States or produced abroad and imported into the United States—of $10.50 per gallon. This sounds fair and simple: domestic products and imports alike bear the same $10.50 per gallon rate of tax. But as applied, this law results in the discrimination de-

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[4] *See* Petition at 3.

[5] *See* Appendix A, *infra*, at p. 1a.

scribed above: *bottled imports* of whisky are taxed $1.47 per gallon more on the average than the same gallon of domestic whisky in the form consumed by the public.[6]

This results because under IRC § 5001 not all "gallons" are the same for tax purposes. Under that section the $10.50 per gallon tax is levied "on each proof gallon, or wine gallon when below proof." Translated this means that "under proof" spirits (less than 50% alcohol by volume) are taxed on the basis of *volume* (hereinafter the "wine gallon" basis). Spirits at proof (50% alcohol, *i.e.*, 100 proof) and "over proof" are taxed on the basis of their *alcoholic content* (hereinafter the "proof gallon" basis, *i.e.*, in terms of their equivalent volume of 100 proof whisky).[7] Thus, any spirits that are subject to tax at a point in time when they are under proof pay the full $10.50 excise tax as though they were at 100 proof.

For domestic whisky the tax is determined upon withdrawal from bond, the Government-supervised warehouses where whisky is aged or stored. IRC § 5006. Since all domestic whisky is at or above 100 proof when withdrawn from bond, the tax is determined on the basis of its alcoholic content (proof gallon).

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[6] As noted in footnote 9 of the opinion of the court below, the tax classification of spirits was established by the Congress in 1868 for purely domestic purposes and has been retained in substance each time the Congress has considered the subject. Her Majesty's Government does not contend that the Congress in first enacting this tax provision did so with a view to discriminating against bottled imports of spirits. Rather the claim is that it now has that effect and serves that purpose.

[7] The "proof" of a distilled spirit is equivalent to twice the percentage of its alcoholic content.

When water is added to bring the whisky to the customary 86 proof at which it is sold to the consumer the effective tax is proportionately reduced to $9.03 per gallon.

For imported whisky the tax is determined at the time of entry into the United States. Since bottled Irish and Scotch whisky comes into the United States ready for consumption at 86 proof there is no way an importer can avoid paying the $10.50 wine gallon rate, $1.47 per gallon in excess of the tax on the domestic product with which it competes.[8]

This is the discrimination in tax burden that is under attack in this case. Petitioners imported both Scotch whisky and Irish whisky, bottled at 86 proof. The imports were assessed with the excise tax at the $10.50 per gallon rate as though 100 proof—or $1.47 per gallon more than the tax paid on an equivalent volume of 86 proof bottled domestic spirits. Petitioners paid the tax under protest claiming that the tax treatment was less favorable than that accorded the like domestic product, in violation of the Irish Treaty.

The Court of Customs and Patent Appeals relying on *Borcal-Vandervoort & Co. v. United States*,[9] construing similar provisions in the General Agreement

[8] Bulk Scotch whisky imported in barrels at 100 proof or more avoids the burden of the extra tax but such whisky does not command the premium price or prestige of Scotch imported in bottles. Moreover, the absence of tax discrimination in the case of bulk imports does not excuse such discrimination in the case of bottled imports.

[9] 46 C.C.P.A. (Cust.) 28 (1958), *cert. denied*, 359 U.S. 953 (1959).

on Tariffs and Trade[10] held that the additional tax borne by the import did not violate the Irish Treaty.

Petitioners below sought to distinguish *Bercut*, a position with which the amicus curiae associated itself.[11] Her Majesty's Government went further, however, and attacked the holding of the Customs Court in *Bercut* as incorrect. Since the court below rejected these views, it follows that review and reversal in this Court is the only way to correct an erroneous precedent on a fundamental question of the law of international commerce.

III

QUESTION PRESENTED

Whether the United States' excise tax on distilled spirits, applied so that *in fact* whisky imported in bottles at the usual proof (86 proof) must pay $1.47 more tax per gallon than that borne by domestic whisky of the same proof, is consistent with a treaty obligating the United States to accord "national * * * treatment in all matters affecting internal taxation" where the treaty defines "national treatment" as "treatment * * * no less favorable than the treatment accorded * * *, in like situations, to * * * products * * * of [the United States]". The Irish Treaty, Arts. XVI, XXI.

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[10] Art II, 61 Stat. (5) A15, BISD Vol. IV; Art. III, 62 Stat. (3) 3680, BISD Vol. IV.

[11] The opinion of the Court of Customs and Patent Appeals notes that "Amicus 'accepts the premise of the Customs' Court that *Bercut* "is not distinguished [from the present case] * * * *"." C.C.P.A. Op. at 424 F.2d 1396, 1401, *quoting* Brief for Amicus, Her Majesty's Government at 6, *Schieffelin v. United States*, *supra* (C.C.P.A.). The court apparently overlooked the prefatory phrase to the quoted excerpt which reads: "for the sake of its main argument in this brief * * *." The statement was not intended to take the position that the two cases are indistinguishable.

IV

REASONS FOR GRANTING CERTIORARI

A. The Court of Customs and Patent Appeals, in Construing the National Treatment Clause in the Irish Treaty Has Decided a Federal Question of Substance Not Heretofore Determined by This Court

National treatment clauses have been traditionally utilized to ensure that, apart from regularly established tariffs, international trade is carried on without discrimination against imports. This mutual commitment is as important in securing equality for United States' exports in the foreign market place as it is for foreign exports seeking equality here.[12] It has been a central element in American commercial policy for almost a half century.[13]

After World War II the United States took the lead in sponsoring a liberal, open and non-discriminatory multilateral system of world trade. A cornerstone of this system is "national treatment", embodied in GATT, to the end that tariff concessions would not be undermined by discriminatory taxes and other non-tariff measures providing "protection" to domestic products.[14] Today 77 countries, including the United

[12] The relevance of the national treatment concept is by no means confined to trade in goods. In the Irish Treaty, the obligation of national treatment is imposed with respect to some eighteen different kinds of activity, including the acquisition and the leasing of land (Article VII); the formation of commercial, scientific and philanthropic companies; and obtaining and maintaining patents of invention and rights in trademarks and trade names (Article VI).

[13] *See* letter from Secretary of State Hughes to Senate Foreign Relations Committee, Foreign Relations of the United States, Department of State, 1924, Vol. II, at 183.

[14] *See* 14 Whiteman, *Digest of International Law* 606, Dept. of State Publication. Vol. 14 to be published about Sept. 1970 (hereinafter cited "14 *Digest of International Law*"). The "national treatment" concept is contained in Arts. II and III of GATT. *See* note 10, *supra*.

States and the United Kingdom, are parties to GATT, and are mutually bound by this pivotal obligation of national treatment.

In the last two decades, the United States has pursued an active program of modernizing its bilateral commercial treaties. The Irish Treaty here involved was concluded in 1950 and was one of the early treaties of this series, all of which were modeled on the concepts of GATT and gave prominence to the national treatment concept. To date the United States has entered into some twenty or more such treaties (listed in Appendix A). To this must be added the scores of other treaties that, while not having "national treatment" provisions, do have "most-favored-nation provisions" that entitle the parties to national treatment rights conferred in other treaties.[15]

Although the content of the national treatment provision has been the subject of heated controversy, not only in the courts[16] but also in the Congress[17] and in the international forum of GATT,[18] this Court has not construed the modern national treatment clause. The decision in this case bears directly on the meaning

[15] Her Majesty's Government's claim in this case arises out of the "most-favored-nation" provision in the British Treaty.

[16] *See* pp. 11-14, *infra*.

[17] The "national treatment" concept and its application to the taxation of imported whisky was the subject of proposed remedial legislation in both the 81st and 82d Congresses. *See* pp. 15, 16, *infra*.

[18] Both the scope of the national treatment clause proposed for inclusion in GATT and its subsequent application to specific items and practices have been the subject of much debate. *See, e.g.*, U.N. DOC EPCT/TAC/PV. 10 at 13-15 (1947); U.N. DOC EPCT/TAC/PV. 10 at 3 (1947); Jackson, *World Trade and the Law of GATT*, ch. 12, §§ 12.2, 12.3 (1970); pp. 19-21, *infra*.

that will be given to the national treatment provisions in all these treaties by United States' courts. The guidance of this Court is required in the present state of the law.[19]

The question presented is not one of merely theoretical or diplomatic interest. In the case at bar alone, it affects the tax treatment of the largest export in terms of dollar volume from the United Kingdom to the United States. Scotch whisky exports from the United Kingdom to the United States were valued at over $263,000,000 in 1969, and amount to more than 12% of the total United Kingdom exports to the United States.[20]

[19] Evidence of the significance of this case in this field is illustrated by the fact that 14 *Digest of International Law* has a topic heading "Discriminatory internal taxes" (p. 813) followed by the topic heading "Method of assessment of taxes as a nontariff barrier" (p. 814), both under a major heading "*Nontariff Trade Barriers*" (p. 782). The only illustration discussed under the "Method of assessment of taxes as a nontariff barrier" is the United States wine gallon method of taxing distilled spirits, citing and quoting from the customs courts' decisions on this issue including *Schieffelin*. There is no other judicial guidance. But *cf. Parrott*, *infra*, at pp. 18-19.

[20] The United States and the United Kingdom historically have been major trading partners. United Kingdom exports to the United States amount to approximately 2 billion dollars a year; United States exports to the United Kingdom in 1968 amounted to approximately 2.3 billion dollars (Department of Commerce, Bureau of Census, *Highlights of U.S. Export & Import Trade*, Dec. 1969; U.S. Imports, Table I-8; U.S. Exports, Table E-6). In 1969 United States' imports of Scotch whisky totaled over 44,000,000 gallons. These detailed statistics and those which follow are derived from the U.S. Department of Commerce, Bureau of Census Statistics for the Year 1969 (Code heading IM 146 Schedule 1, Part 12).

For the year 1969 alone the excess tax payable on bottled Scotch imports by virtue of the wine gallon method of assessment amounted to over $45,000,000. Moreover, the tax discrimination against under proof bottled Scotch places heavy economic pressure on the United States importer to import Scotch in bulk, at or above proof. The export value of 86 proof bottled Scotch whisky to the United Kingdom is $7.45 per wine gallon; the export value of bulk Scotch whisky at 100 proof or above is only $2.50 per *proof* gallon (equal to $2.15 per gallon at 86 proof). The United Kingdom thus was deprived of over $80,000,000 in dollar earnings in 1969 because of the effect of the wine gallon method of taxation in diverting exports of Scotch whisky from bottled to bulk form.[a]

In *Bercut*, the court said that the importer could avoid the discriminatory impact of the tax by importing in bulk. But this expedient does not help the United Kingdom, the contracting party to which the obligations of the treaties run.

The implications of this case are broader still. The "Kennedy Round" of tariff negotiations under GATT, terminating in 1967, is reducing the level of national tariffs to a point where tariff barriers will cease in most cases to be an important impediment to expanding world trade among developed countries. The principal remaining obstacles are the so-called "non-tariff"

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[a] 13,075,449 proof gallons of spirits were exported to the United States in bulk form in 1969 at an export price of $2.50 per proof gallon, yielding to the United Kingdom an export value of $32,688,623. If shipped in bottles at 86 proof, the volume would have been 15,204,010 gallons with an export price of $7.45 per wine gallon yielding to the United Kingdom an export value of $113,269,875. The total loss of dollar earnings is the difference between $113,269,875 and $32,688,623 or $80,581,252.

barriers against certain of which the national treatment clause is designed to serve as a safeguard.

It is no secret that every country harbors its little covey of non-tariff barriers and its group of industries that nestle under this protection. The United States properly demands that other countries eliminate their non-tariff barriers as serious obstacles to expanding international trade, even where there is no present treaty commitment requiring such action. But as long as it maintains its own discriminations, like the one here involved *which is covered by existing treaty obligations*, doubt must remain about the sincerity of the United States in its efforts to eliminate non-tariff barriers. That doubt, on an issue of this magnitude, can only be resolved by a decision of this Court.

B. Bercut Was Wrongly Decided and Previous Failures To Grant Certiorari Should Not Be Dispositive of the Present Petition

The amicus brief filed with the Court of Customs and Patent Appeals argued that the holding in *Bercut* was wrong. Nevertheless the court below reaffirmed that case and treated it as a controlling precedent. The holding in *Bercut* should therefore be reviewed by this Court.[23]

[22] *See generally*, Wilson, *Non-Tariff Barriers to International Trade: A Survey of Current Problems*, 18 J. Pub. L. 403 (1969).

[23] *Bercut* involved the question of whether the wine gallon method of taxing bottled imports of distilled spirits was contrary to the national treatment provisions of GATT. In the present case it is uncontested that the national treatment provisions of GATT are the equivalent of those in the Irish Treaty. To that extent *Bercut* and this case raise the same basic legal issue.

The Court declined to grant certiorari in both *Berent*, 359 U.S. 953 (1959), and a subsequent case, *China Liquor Distrib. Co. v. United States*, 52 C.C.P.A. (Cust.) 1, 343 F.2d 1005 (1964), *cert. denied*, 380 U.S. 962 (1965), raising a corollary issue but decided on the basis of *Berent*. These prior actions should not be dispositive of the instant Petition.[7] *Berent* was the first major interpretation of GATT by the Court of Customs and Patent Appeals, but the court did not have adequate materials available for the resolution of the complex and novel issue involved. For example, the Government brief twice quoted some of the applicable provisions of GATT. But both times it omitted the passages that clearly spelled out the purpose of the provision that the court was interpreting: "* * * internal taxes * * * should not be applied * * * so as to afford protection to domestic production", 62 Stat. (3) 3680, BISD Vol. IV, at 6. The whole discussion of GATT in the *Argument* portion of the Government brief consisted of little more than two pages, of which one page was quotations from the Agreement.

Moreover, the original GATT source documentation consists of thousands of pages of official and published documents. There is a similar quantity of

[7] As will be noted later, *Berent* has never been squarely challenged in any subsequent Court of Customs and Patent Appeals' case, probably because a challenger would be faced with the fact that even if *Berent* were wrong in its construction of the national treatment provisions of GATT, the importer could not win. A Protocol to GATT provided that relevant portions of the Agreement would not apply to existing legislation. 61 Stat. (6) A2054, BISD Vol. IV, at 77-78. The wine gallon provision of the Internal Revenue Code was within the class of exempt legislation. There is no comparable "grandfather" clause in the Irish Treaty and that is one reason why Petitioners here invoke the Irish Treaty rather than GATT. *See* pp. 17, 18, *infra*.

material in the hearings before the Congressional Committees dealing with United States' participation in GATT and the International Trade Organization (ITO).[25] These sources were not indexed, or were inadequately indexed, when *Bercut* was before the court in 1958, and even today the situation is far from ideal. Only recently, some twenty years after the event, have some solid reference works emerged. *See, e.g.*: Dam, *The GATT—Law and International Economic Organization* (1970); Jackson, *World Trade and the Law of GATT* (1970); 11 Whiteman, *Digest of International Law*, Dept. of State Publication, to be published about Sept. 1970. It is not even clear whether the court below had access to these reference works at the time it considered its decision in the instant case. In any case it did not cite them in its opinion.

In *China Liquor Distrib. Co.* v. *United States*, *supra*, the court followed *Bercut* without re-examining its basis. Appellants' brief before the Court of Customs and Patent Appeals in *China Liquor* assumed *Bercut* as controlling and sought to distinguish it.[26] Similarly,

[25] *See* Part 2 (Exhibits) Hearings before the Committee on Finance, United States Senate, 80th Congress, 1st Session, on Trade Agreements System and Proposed International Trade Organization (ITO) Charter ("Part II—1947 Senate Hearings")—which fully documents the pre-eminent rôle the United States played in developing both ITO and GATT. (*Cf., e.g.*, p. 885 of Part II.) *See* also, Department of State Memorandum for the President of April 27, 1949, on ITO included in Hearings before the Committee on Foreign Affairs, House of Representatives, 81st Congress, 2nd Session, on H.J. Res. 236 (participation in ITO) 3, 4 (hereinafter the "1950 House Hearings on ITO").

[26] Brief for Appellants at 51, *China Liquor Distrib. Co.* v. *United States*, *supra*. So, too, the Government's brief relied on *Bercut* but did not address itself to its underpinnings. *See* Brief for Appellee at 14, *China Liquor Distrib. Co.* v. *United States*, *supra*.

the Petition for Certiorari failed to challenge *Bercut* on the merits, averring only that it was distinguishable.

An analysis of the material not before the court in *Bercut* inescapably leads to the conclusion that the Court of Customs and Patent Appeals misconstrued the national treatment provisions of GATT and has extended this misconstruction to the Irish Treaty in the instant case.

Although the merits of the holding in *Bercut* cannot properly be argued in detail at this stage of the proceedings, the weakness of that case can be illustrated by other means. *Bercut* has on several occasions been the subject of critical scholarly analysis. A Columbia Law Review study concluded of *Bercut* that:

> "under any reasonable interpretation of article III [of GATT], this decision is unacceptable". *Id.* at p. 550.

Similarly, Dam in *The GATT: Law and International Economic Organization* 130 (1970) states:

> "Does the system of assessment [*i.e.*, wine gallons] violate Article III [of GATT]? The U.S. Court of Customs and Patent Appeals held that it did not in *Bercut-Vandervoort & Co. v. United States*. The court relied on the formal equality between imported and domestic spirits under the terms of the statute. However elegant the opinion's demonstration of equality, the absurdity of the conclusion from an international trade perspective is revealed by the court's concession that the foreign distiller could avoid any competitive disadvantage

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"Note, *United States Participation in the General Agreement on Tariffs and Trade*, 61 Colum. L. Rev. 505, 549-551 (1961); *See* Wilcox, *supra*, at p. 505.

due to the tax assessment system by establishing bottling facilities in the United States. The underlying assumption of the General Agreement indeed, the argument for free trade in general is that local laws and regulations should not make the location of industry a factor in trade. To say that part of the foreign industry must be moved to the United States for the foreign product to have the same competitive position as the domestic product is to concede that the legislation in question distorts international trading patterns and serves 'to afford protection to domestic production.' On the purely technical level, the decision in *Bercut-Vandervoort* may be criticized on the ground that the court considered only the first sentence of paragraph 2 and therefore treated the question as simply one of equal treatment of 'like' products. But given its argument that imported bulk liquor is treated equally with domestic bulk liquor, the court acted strangely in not also considering whether, under the second sentence of paragraph 2 (incorporating by reference paragraph 1) and the interpretative note to paragraph 2, the taxation of imported bottled liquor did not serve to 'afford protection to domestic production' (paragraph 1) to 'a directly competitive or substitutable product which was not similarly taxed' (interpretative note to paragraph 2). The protection afforded the domestic product is the heart of the matter."

See also Kelly, *Nontariff Barriers*, appearing in Balassa, *Studies in Trade Liberalization* 265, 303-304 (1967) quoted in 14 *Digest of International Law* 814-815.

The truth of the matter is that the holding in *Bercut* was contrary to the position of the Executive Branch of the Government in seeking Congressional authority

in 1950 and 1951 for unqualified adherence to GATT on the part of the United States.[28] Legislation was introduced on behalf of the Administration in both years which would have made then-existing United States law conform with the GATT.[29] One of the items the Administration sought to correct was the wine gallon method of tax assessment because it regarded that method as contrary to the United States' commitments under GATT.[30] Administration witnesses and statements from the State Department, Treasury Department, and the Tariff Commission interpreted wine gallon as incompatible with GATT and no Administration witness expressed a contrary view.[31] These same agencies and several of the witnesses appearing before the Congressional committees participated on behalf of the United States in negotiating GATT. This construction by the Executive Branch of the Government is crucial evidence of the scope of GATT's national treatment provisions, but it was regrettably not before the court in *Bercut*. The reliability of that decision must be evaluated accordingly.

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[28] *See* Treasury Department Analysis of the Customs Simplification Act of 1950, H.R. 8304, 81st Cong., 2d Sess., contained in Hearings Before the Committee on Ways and Means, House of Representatives, 82d Cong., 1st Sess., on H.R. 1535 (hereinafter cited as 1951 House Simplification Hearings); 1951 House Simplification Hearings, at 92-212 (Remarks of, *inter alia*, John S. Graham, Assistant Secretary of Treasury and W. R. Johnson, Assistant to the Commissioner of Customs, on H.R. 1535).

[29] H.R. 8304, 81st Cong., 2d Sess.; H.R. 1535, 82d Cong., 1st Sess.

[30] H.R. 8304, *supra*, § 24(d); H.R. 1535, *supra*, § 24(d).

[31] *See* note 28, *supra*, and Testimony of Mr. Winthrop G. Brown, Director of Office of International Materials Policy, Department of State, 1951 House Simplification Hearings, *supra*, at pp. 609, 610, 613-614, 627-628, 650, 651.

There is a final irony about the decision in *Bercut*: The court could have arrived at exactly the same decision without the need for construing the national treatment provisions of GATT. The United States undertook the obligation of GATT subject to a Protocol executed on October 30, 1947.[32] This Protocol provided that the United States was bound by the national treatment provisions of GATT only "to the fullest extent not inconsistent with existing legislation". The wine gallon provision was concededly existing legislation,[33] and the Protocol exempting such legislation should have been dispositive in *Bercut*.

Although the ultimate decision in *Bercut* was correct (by virtue of the Protocol and not on the grounds adduced by the court), that case must be re-examined because its erroneous holding concerning the application of national treatment to the wine gallon tax scheme has been accorded the force of *stare decisis* by the customs courts. That case decided prematurely and

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[32] Protocol of Provisional Application, 61 Stat. (6) A2051, BISD Vol. IV, at 77:

> "1. The Governments of * * * and the United States of America, undertake * * * to apply provisionally on and after 1 January 1948:
>
> (a) Parts I and III of the General Agreement on Tariffs and Trade, and
>
> (b) Part II of that Agreement *to the fullest extent not inconsistent with existing legislation.*" (Emphasis added.)

Article III of the GATT relating to National Treatment on Internal Taxation and Regulation appears in Part II of the GATT and is thus subject to this Protocol.

[33] INT. REV. CODE OF 1939, § 2800, 52 Stat. 572 (now INT. REV. CODE OF 1954, § 5001(a)(1)).

erroneously an important issue of construction in a major and complex multilateral agreement. The GATT established an international organization to administer and carry out its provisions. Like an administrative agency in our domestic system, this organization must be free to evolve its own pattern of interpretations in its area of special competence; and these when formulated may provide a guide to the various domestic courts confronted with the same problem. By addressing the substantive issue of the scope of national treatment under GATT, rather than basing its decision in *Bercut* on the Protocol, the Court of Customs and Patent Appeals preempted this interpretative task of GATT. The decision below renews this error.

C. The Decision of the Court Below Is in Conflict With a Decision of the Ninth Circuit Court of Appeals Construing a Similar Provision of the IRC Applicable to Spirits Imported from the Virgin Islands

Since the Court of Customs and Patent Appeals has exclusive jurisdiction over appeals on protests of taxes levied on imported articles, a conflict of circuits involving one of its decisions cannot arise in the strict sense. Rule 19(2) of this Court recognizes this anomaly by providing that the "same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the * * * Court of Customs and Patent Appeals * * * *". In this case, there is as close an approximation to a direct conflict of circuits as is possible in the circumstances.

The Court of Appeals for the Ninth Circuit in *Parrott & Co. v. United States*, 156 F.2d 943 (9th Cir. 1946), construed the equivalent of the Irish

Treaty's national treatment clause in a federal statute that accorded imports from the Virgin Islands "a tax equal to the internal revenue tax imposed in the United States upon like articles of domestic manufacture".[34] The operative words of the statute were "a tax equal to" while those of the Irish Treaty are tax "treatment no less favorable than" that imposed on like domestic United States' products. In practical terms, the two formulations are equivalents —both a treaty provision and a federal statute are entitled to the same force as law. The Court of Appeals in *Parrott* held that bottled rum imported from the Virgin Islands under proof (e.g., 86 proof) was taxable on a proof gallon basis rather than on the wine gallon basis as the Government claimed. The national treatment provision in the Irish Treaty was given the opposite construction in the present case. The inconsistency constitutes a conflict in the federal judiciary within the spirit of Rule 19(1)(b) and (2) of the Court.

D. The Decision Below Is in Conflict With the Interpretation of the National Treatment Clause Advanced by the State Department as the Responsible Organ of the United States Government for Dealing With Foreign Governments, and With the Interpretation Maintained by the Major Trading Partners of the United States

The United States has been criticized in the GATT for the wine gallon method of tax assessment.[35] *See*, GATT Committee on Trade in Industrial Products,

[34] INT. REV. CODE OF 1939, § 3350, 40 Stat. 1142 (now INT. REV. CODE OF 1954, § 7652(b)(1)).

[35] As noted earlier, however, GATT proceedings cannot be used to enforce Article III against the United States' wine gallon legislation because in GATT the United States Government would argue that GATT could take no decision on wine gallon in view of the Protocol.

"Inventory of Non Tariff Barriers" ("Protection" by means other than tariffs), GATT Document COM. IND 6 Add. 5 (1968). Although this document is classified by GATT, Her Majesty's Government was authorized by the European Economic Community to inform the court below that the report notes that the Community has protested the United States' excise tax system for spirits imported in bottles as contrary to Article III of GATT.[36] The Government of Canada has likewise granted permission to advise the Court of Customs and Patent Appeals that it had raised the same issue in GATT. Her Majesty's Government has also pressed its objection in that forum. The GATT document makes it clear that most of the major trading nations in the world are in agreement that the United States' wine gallon tax on bottles of imported distilled spirits affords protection to domestic production which in the absence of the Protocol would be prohibited by Article III.

Similarly, the Government of Ireland does not agree with the construction that the United States is placing on the Irish Treaty in this case. The Government of Ireland squarely challenged the correctness of the position of the United States in the Customs Court below.[37] It has filed a similar note with the Department of State for the benefit of this Court.[38]

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[36] An examination of this portion of the document has been authorized by the Community and Her Majesty's Government.

[37] Full text of the Note and Memorandum submitted by the Irish Ambassador filed with the Customs Court below. Copies appear in *Memorandum for the United States* filed with this Court in this case by the Solicitor General.

[38] *See* note 37, *supra*.

Finally, the Department of State itself is on record as to the discriminatory nature of the wine gallon basis for tax assessment. An exchange of correspondence with the British Embassy in Washington in October 1954 on the subject of the wine gallon tax stated:

> "The Department shares your views that the effect of this tax is to discriminate against imported distilled spirits."[39]

This remains the position of the Department of State in its dealings with foreign governments. During a GATT Working Party meeting in April 1970, representations were made that the United States' wine gallon tax was discriminatory under GATT. The United States' representative at this meeting acknowledged that the tax had a "non tariff barrier" effect that discriminated against bottled imports of whisky.[40] He, nevertheless, maintained that it was exempt from the Article III prohibition by virtue of the Protocol.[41]

Stated quite simply, the United States in its dealings with foreign governments does not claim that the

[39] Letter from Samuel Waugh, Assistant Secretary for Economic Affairs, Department of State, to Charles Empson, Commercial Minister, British Embassy, 12 Oct. 1954. Full text of exchange of letters appended to British Note and Memorandum of February 20, 1968, is filed with the Customs Court below. Copies appear in Appendix B to Her Majesty's Government amicus brief filed with the Court of Customs and Patent Appeals.

[40] GATT Working Party on Border Tax Adjustments—Draft Report Spec (70) 31/Rev. 1, 28 April 1970, at 80. This report is classified by GATT but Her Majesty's Government has advised counsel that it does not consider that formal GATT clearance is necessary for this reference to such document. The full text thereof can be made available to the Court by the State Department.

[41] *See* pp. 17, 18, *supra*.

wine gallon method of tax assessment conforms to national treatment standards. How can one reconcile this position of the United States' Department of State with that of its Court of Customs and Patent Appeals?

CONCLUSION

For the foregoing reasons the Petition for Certiorari should be granted.

Respectfully submitted,

ANSEL F. LUNFORD
ABRAM CHAYES

Of Counsel:

MORGAN, LEWIS & BOCKIUS

Dated: August 21, 1970

APPENDIX A

Post 1947 Treaties of Commerce That Contain National Treatment Clauses

Country	Treaty	Effective Date	TIAS *	UST or STAT	National Treatment Article
Belgium	Friendship, Establishment & Navigation	1963	5432	14 UST 1284	9 †
China	Friendship, Commerce & Navigation	1948	1871	63 STAT 1299	X † XVIII **
Denmark	Friendship, Commerce & Navigation	1961	4797	12 UST 908	XI † XVI **
Ethiopia	Amity & Economic Relations	1953	2864	4 UST 2134	X(1) †
France	Convention of Establishment	1960	4625	11 UST 2398	IX †
Germany	Friendship, Commerce & Navigation	1954	3593	7 UST 1839	XI † XVI **
Greece	Friendship, Commerce & Navigation	1954	3057	5 UST 1829	16 † 19 **
Iran	Amity—Economic Relations & Consular Rights	1955	3853	8 UST 899	VI †
Ireland	Friendship, Commerce & Navigation	1950	2155	1 UST 785	IX † XVI **
Israel	Friendship, Commerce & Navigation	1954	2948	5 UST 550	XI † XVI **
Italy	Friendship, Commerce & Navigation	1949	1965	62 STAT 2255	IX † XVI **

* See p. 2a for footnote.

** See p. 2a for footnote.

† See p. 2a for footnote.

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No. 425

In the Supreme Court of the United States

OCTOBER TERM, 1970

SCHIEFFELIN & CO. AND BEITZELL & CO., INC.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1970

SCHIEFFELIN & CO. AND BEITZELL & CO., INC.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

1. Petitioners commenced these protests in the Customs Court challenging the internal revenue tax and tariff duty levied against 86 proof bottled spirits imported from Ireland and Scotland between March 1964 and April 1965. These Irish and Scotch whiskey importations in bottles were taxed at the rate of $10.50 per gallon under 26 U.S.C. 5001(a)-(1). (Pet. 3), and assessed a duty of $1.02 per gallon (Pet. 8).

Petitioners contend that the imposition of these taxes on Irish whiskey violated the national treatment provision in the Treaty of Friendship, Commerce and Navigation with Ireland, 1 U.S.T. 788. This provision (Art. XVI, 1 U.S.T. at 797), states that "in all mat-

ters affecting internal taxation and sale, distribution, storage and use," the United States will accord to products imported from Ireland, "national treatment," that is, treatment "upon terms no less favorable than the treatment accorded * * * *in like situations*, to" products of the United States (emphasis added). (Art. XXI, 1 U.S.T. at 801.) As to Scotch whiskey, petitioners rely on the treaty with Great Britain, 8 Stat. 228, assuring most favored nation treatment with respect to "duties."

Petitioners claim these treaty provisions are violated because in practice bottled domestic whiskey below 100 proof bears tax at a lower rate than whiskey of the same proof bottled abroad and imported. Section 5001(a)(1) of the Internal Revenue Code imposes a flat tax of $10.50 per gallon upon spirits of 100 proof or less, with a proportionate increase for spirits above 100 proof. The tax is imposed when the spirits are withdrawn from bond. 26 U.S.C. 5006(a)(1) (Pet. 4). Domestic whiskey is in practice withdrawn from bond in bulk at 100 proof or above, then diluted, usually to 86 proof, and bottled; the effective tax borne by a gallon of domestically bottled 86 proof whiskey is thus $9.03. Whiskey imported in bottles at 86 proof—as the Scotch and Irish whiskey involved in this case was—is, however, taxed at the full rate of $10.50 per gallon because it is shipped at the lower proof level, and is naturally withdrawn from customs bond at this lower proof.

2. Both courts below correctly concluded that the different effective tax on below-proof domestic whiskey

(removed from bond at 100 proof) and imported whiskey (bottled abroad below 100 proof) did not violate the national treatment provision of the Irish treaty because "like situations" were not involved. The factor which determines the amount of tax is alcoholic volume upon withdrawal from bond, not place of distillation. The distinction between above 100 proof and below 100 proof spirits has been consistently employed in internal revenue statutes for more than a century. See Act of July 20, 1868, 15 Stat. 125. When bottled 86 proof imported whiskeys and bulk 100 proof domestic whiskeys are withdrawn from bond, they are different products for purposes of taxation. A "like" situation is importation of whiskey in bulk at or above 100 proof, with bottling in the United States after withdrawal from bond. The effective tax on whiskey so imported and subsequently diluted to 86 proof is the same as that on 86-proof domestic whiskey.

3. This problem has had a long history. It rests on a statutory scheme which has been in effect without change for more than 100 years. The issue has been frequently raised in the past, and it should be regarded as settled as far as the present law is concerned.

We recognize the great economic importance of the question to producers of spirits in the United Kingdom, Ireland, and other countries. Both the United Kingdom and Ireland have made their strong inter-

---

[1] Petitioner incorrectly contends that the other "like situation"—withdrawal from bond of domestic whiskey at below proof—is not possible because of 26 U.S.C. 5233 (Pet. 14). Although that section requires all whiskey bottled in bond for domestic use to be at least 100 proof, it does not prevent withdrawal of below-proof spirits in bulk prior to bottling.

ests known in papers filed with this Court. Nevertheless, we feel that the matter is not one which requires further review here.

There are three ways in which the law in this area might be changed: (a) by treaty, (b) by legislation, or (c) by court decision.

(a) The treaty making power in the United States is in the President "by and with the Advice and Consent of the Senate * * * provided two thirds of the Senators present concur." No such treaty has been adopted; nor has one been proposed to the Senate.

(b) The statutory provisions applicable to this case could be changed by Act of Congress. As is pointed out in the brief of amicus curiae (pp. 15–16), the matter was thoroughly canvassed by Congress in 1950 and 1951, and legislation which would have brought about changes in the statute law was introduced and fully considered. Congress took no action.

(c) Finally, the matter has been fully and carefully reviewed on several occasions by the Court of Customs and Patent Appeals, which is the tribunal especially established to make appellate decisions in customs cases. These decisions extend over a period of many years, and this Court has twice denied certiorari. *Bohemian Distributing Co. et al. v. United States*, 15 Cust. Ct. 121; *Vernon Distributing Co. v. United States*, 39 C.C.P.A. 205; *Berent-Vandervoort*

A communication from the Embassy of Ireland has been filed with the Court in a previous Memorandum for the United States. See also the communication from the Commission of the European Communities, which is set forth in the Appendix to the present Memorandum.

and Co. v. *United States*, 46 C.C.P.A. 28, certiorari denied, 359 U.S. 953; *China Liquor Distributing Co.* v. *United States*, 343 F. 2d 1005, 52 C.C.P.A. 1, certiorari denied, 380 U.S. 962.

In both of the cases where petitions were filed with this Court, the interests of foreign governments were made apparent. Nothing really new is presented in the present petition. The amicus acknowledges (Amicus Br. 17) that the General Agreement on Tariffs and Trade is inapplicable because of the provision of the Protocol to that agreement, which expressly exempts "existing legislation"—and the legislation involved here was in existence long before GATT was entered into. United States adherence to the GATT is by Executive Agreement, not by exercise of the treaty power, and thus could hardly be effective to amend an Act of Congress.

The only matter that is newly raised here is the Irish treaty. But this presents no question which has any difference in substance from those presented and decided in the previous cases. The question was dealt with fully in the *Borcal* case (on the assumption that the similar provisions of GATT applied), which was then followed by the court below in the *China Liquor* case, and in the present case. With respect to the Irish treaty, it may be observed that it became effective in 1950 (Pet. p. 3). It is obvious that there was no contemplation or understanding that the Irish treaty had disposed of the problem when the question of unqualified adherence to GATT was before Congress in 1950 and 1951. To construe the Irish treaty to reach

the result sought by the petitioners here would surely be an afterthought, not intended by the Executive branch nor contemplated by the Legislative branch when the Irish treaty was proposed and approved and when GATT received legislative consideration.

Finally, petitioners contend that there is a conflict between the decision below and that in *Parrott and Co. v. United States*, 156 F. 2d 943 (C.A. 9). Obviously, though, the underlying question there was different from that raised here. Moreover, the issue there was *when* the tax attached to rum produced in the Virgin Islands. The Court held that the tax attached "as soon as distillation was complete," 156 F. 2d at 948, and ruled "that the cases cited, respecting ordinary imported distilled liquors have no application." 156 F. 2d at 947. Petitioners do not argue that the tax on the Irish and Scotch whiskey involved here attaches upon distillation; 26 U.S.C. 5006 expressly states that the tax "shall be determined when the spirits are withdrawn from bond." It is thus clear that the *Parrott* case leaves open the question involved here, and that there is no conflict of decisions.

In these circumstances, there is no reason now for the further review of this problem by this Court.

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1970.

APPENDIX

The following communication was received by the United States Mission to the European Communities, in Brussels, and transmitted to the State Department. In accordance with the suggestion which it contained, and at the request of the State Department, it is here placed before the Court.

July 31, 1970
No. 1812

Commission of the
European Communities
Directorate-General
of Foreign Trade

XI–A–1

NOTE VERBALE

The Directorate-General of Foreign Trade of the Commission of the European Communities presents its compliments to the Mission of the United States of America and has the honor of referring to its note verbale of October 1, 1969 in which it had asked the competent authorities of the American government to be so kind as to inform the 'United States Court of Customs and Patents Appeal' of the viewpoint of the European Economic Community on the American taxation system called 'wine gallon assessment', the validity of which has been questioned by an American importer. According to the information obtained by the Directorate-General of Foreign Trade, the importer intends to ask that the litigation be brought to the Supreme Court of the United States.

The European Economic Community considers this taxation system contrary to the international rules based on the GATT provisions. It therefore has a special interest in a possible judgment of the Supreme Court on this question. The Community intends to ask, at the appropriate time, the Government of the United States and the Supreme Court, if it could present its viewpoint as "amicus curiae."

The Directorate General of Foreign Trade would appreciate it very much if the United States Mission would inform the competent authorities of the American government as well as the Supreme Court of the contents of this note.

The Directorate General of Foreign Trade takes this occasion to reiterate to the United States Mission in Brussels the assurance of its highest consideration.

The United States Mission
to the European Communities
Brussels

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 425

SCHIEFFELIN & Co. and BEITZELL & Co., INC.,
Petitioners

v.

UNITED STATES OF AMERICA

PETITIONERS REPLY BRIEF TO THE MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 425

SCHIEFFELIN & Co. and BEITZELL & Co., INC.,
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v.

UNITED STATES OF AMERICA

PETITIONERS REPLY BRIEF TO THE MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This brief is filed under paragraph 4 of Rule 24 to point out arguments first raised in the memorandum in opposition that misstate (a) the decision of the Ninth Circuit Court of Appeals in the *Parrott* case and (b) the position of the petitioners. A third error of the respondent is the unsubstantiated statement that the interests of foreign governments were made apparent in the *Bercut* and *China Liquor* cases in which this court denied certiorari.

The Parrott Case

In an effort to counter petitioners' argument that the decision of the Court of Customs and Patent Appeals in the pending case is in conflict with the decision of the Ninth Circuit Court of Appeals in the *Parrott* case, the respondent has misstated the opinion of the latter court. The respondent avers that the court held that the United States tax attached to the rum produced in the Virgin Islands "as soon as the distillation was complete." (Memorandum in opposition page 6).

Actually what the court held in *Parrott* was that the tax on rum *produced in the United States* attaches at the instant the distilled substance is in existence. (156 F. 2d 947) Then the court held that Congress intended that the tax on Virgin Islands rum *would be the equivalent* of that on domestic rum, that is the amount which *would have* attached as soon as the distillation was complete. (page 948)

The Court did not say that the tax attached to the rum in the Virgin Islands. That would have been a strange interpretation of a statute that imposed the tax on articles *coming into* the United States from the Virgin Islands.

However, the respondent's misstatement of the court's decision has given us another opportunity to note how parallel are the questions in *Parrott* and in the pending case.

Petitioners' Point

In discussing the crucial problem of "like situations" on page 3, the memorandum in opposition attributes to the petitioners a position they have never taken and as

proof that petitioners are in error cites a possibility that domestic spirits could be withdrawn in bulk at below proof and thereby become subject to the wine-gallon tax which petitioners contend discriminates against imports.

Petitioners have never contended that the tax is discriminatory in the case of bulk spirits. Indeed, in their initial brief to the Customs Court dated April 28, 1967, petitioners agreed that the tax could apply to bulk domestic spirits and therefore does not discriminate against bulk imports. (page 11)

Petitioners' case is that the tax does discriminate against bottled imports, that this is contrary to the national treatment provisions of the treaty with Ireland and that section 7852(d) of the Internal Revenue Code makes any tax provision inapplicable when contrary to the treaty.

To support the position that the tax is discriminatory, petitioners have cited section 5006 (new in the 1954 Code) and 5233(b) that preclude determination of the tax on domestic bottled spirits on the basis of wine gallons. This is the argument which the respondent says is in error because the wine-gallon tax might be determined on domestic bulk spirits. Petitioners ask the court to reject this misstatement of their position and to conclude that the respondent has not been able to make a relevant response.

Interests of Foreign Governments

On page 5 of the memorandum it is stated that "In both cases where petitions were filed with this Court [i.e., *Bercut* and *China Liquor*], the interests of foreign governments were made apparent." The record in

these cases fails to show any participation therein by any foreign government—nor does it show how their interests were otherwise "made apparent" to this Court. To argue, as was argued in at least one of these petitions, that there are commercial benefits in bottling distilled spirits abroad is a far cry from showing the interests of foreign governments in the over all national treatment treaty issue. Contrast this with the fact that in this case the British and Irish Governments have stated their position to this Court—as has the Commission of the European Communities (i.e., the Common Market countries). Only *Schieffelin* (not *Bercut* and *China Liquor*) poses the national treatment treaty issue free from the defense of the Protocol to GATT and the interested governments now are asking for their "day in Court" to establish their treaty rights.

Over-All Question

There remains one over-all observation regarding the Memorandum In Opposition. The Government appears to be stating that whether or not the U.S. is carrying out its treaty obligations with 76 other countries is not an important question for this Court to determine. We ask this Court: Is that true?

Respectfully submitted,

EDWIN G. MARTIN
Attorney for Petitioners

October 5, 1970

the Court of the United States

OCTOBER TERM, 1970

No. 425

FFELIN & CO. and BEITZELL & CO., INC.,

Petitioners,

v.

THE UNITED STATES,

Respondent.

PETITION FOR REHEARING

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 425

SCHIEFFELIN & CO. and BETTZELL & CO., INC.,

Petitioners,

v.

THE UNITED STATES,

Respondent.

PETITION FOR REHEARING

The petition for certiorari in this case was denied on October 19, 1970 and permission was granted to permit the filing of a petition for rehearing on or before December 14, 1970.

This petition for rehearing is filed under paragraph 2 of Rule 58 to present for consideration an intervening circumstance of at least substantial effect. It now appears that the issue in this case may be submitted to the International Court of Justice for determination.

Following the denial of the petition for certiorari in this case, counsel has been informed that Her Majesty's Government may have to consider an international-juridical resolution of this matter and that it would be of great assistance to have the decision of the highest court of the United States on the issue involved. A copy of the letter of December 10, 1970 from the British Embassy to counsel is annexed hereto.

Since the International Court of Justice is the only forum to which both the United States and the United Kingdom have given their consent for the settlement of international disputes of this type counsel assumes that it is to that body that Her Majesty's Government would turn for an "international juridical resolution" of this matter. That Court has jurisdiction to determine whether, as Her Majesty's Government believes, the United States is violating the terms of the British Treaty in persisting in the wine gallon method of assessment on imported spirits.

This new development raises important additional reasons for Supreme Court review. As far as the jurisdiction of the World Court is concerned, local remedies were exhausted to whatever extent is necessary when this Court denied certiorari on October 19, 1970. (See *Interhandel* cases, *Societe Internationale Pour Participations Industrielles v. Rogers*, 357 U.S. 197 (1958); *Switzerland v. United States* [1959] I.C.J. Rep. 6). Nevertheless, counsel believes that it would be inappropriate from the point of view of the United States to have the matter reviewed by the International Court of Justice in its present posture — that is, on the basis of the opinion of the Court of Customs and Patent Appeals, an intermediate court of limited and technical jurisdiction.

In the present case a decision on the merits by this Court would be of great assistance to the International Court of Justice even though it were adverse to the position of the petitioners. The opinion of this Court would clarify the issues of treaty interpretation and application and thereby

facilitate the consideration of these matters by the International Court of Justice. While analogies to relationships between domestic courts have certain inherent difficulties, it should nevertheless be noted that this Court has traditionally remanded cases to state and federal appellate courts in recognition of the assistance they might provide by ruling upon questions that they had not previously considered. See e.g. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969); *Rosenberg v. Fleuti*, 374 U.S. 449 (1963).

If on the other hand, the Court should grant the petition and decide the question favorably to the petitioners, recourse by Her Majesty's Government to the International Court of Justice would become unnecessary. There is thus presented an additional reason for this Court to grant the petition for certiorari. This interest in eliminating the necessity of an International Court decision has a domestic corollary in the doctrine of abstention. That principle of judicial restraint arises in part from the recognition that disputes are better settled at the local level thereby avoiding "'needless friction' between federal pronouncements and state policies". *Reetz v. Bozanich*, 397 U.S. 82, 87 (1970) quoting *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941). The same policy should favor the avoidance of a potentially unnecessary decision by the International Court of Justice.

For these reasons, petitioners herein respectfully request that the petition for rehearing be granted.

Respectfully submitted.

Edwin G. Martin

December 11, 1970

BRITISH EMBASSY
WASHINGTON

10 December, 1970.

Dear Mr. Martin,

Please refer to Schieffelin & Co. et al. v. The United States, Supreme Court of the United States, October Term, 1970 - No. 425. Her Majesty's Government's deep interest in the outcome of that case was evidenced by its briefs amicus curiae filed with both the Court of Customs and Patent Appeals and in support of the Petition for Certiorari denied October 19, 1970. After consultation with this Embassy you sought and obtained an extension of time in which to file a petition for rehearing until December 14, 1970.

I have now been instructed by Her Majesty's Government in the United Kingdom to inform you that the Schieffelin proceedings concern a matter which has for so long been in dispute between the two Governments that Her Majesty's Government would welcome consideration of it by the highest court in the United States. In this connection, and in view of the importance attached to the outcome of this matter, I have been further authorised to state that Her Majesty's Government may have to consider an international juridical resolution of the matter and it would

/be

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be of great assistance to have the decision of the highest court in the United States on the issue involved.

You are free to make known these views of Her Majesty's Government in your Petition for Rehearing.

Yours sincerely

G.E. Millard

(G.E. Millard)
H.M. Chargé d'Affaires